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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RALPHS GROCERY COMPANY, Plaintiff and Appellant, v. KELVIN MASSIE et al., Defendants and Respondents.	D042249 (Super. Ct. No. GIC805279)

APPEAL from an order of the Superior Court of San Diego County, Lisa Foster, Judge. Reversed and remanded with directions.

Littler Mendelson, Henry D. Lederman, Kenneth J. Rose, Kristin M. Stockholm and Marissa M. Tirona for Plaintiff and Appellant.

Sessions Kimball & Turner, Don D. Sessions and Patrick E. Turner for Defendant and Respondent Kelvin Massie.

Miles E. Locker for Defendant and Respondent Arthur Lujan.

Plaintiff Ralphs Grocery Company (Ralphs) appeals an order denying its petition to (1) compel defendant Kelvin Massie, its terminated former employee, to arbitrate an

employment discrimination complaint he filed with the California Division of Labor Standards Enforcement (DLSE); and (2) stay defendant Arthur Lujan from taking any administrative action on Massie's complaint in Lujan's capacities as the DLSE's Chief and California's Labor Commissioner.[1] Ralphs contends the superior court reversibly erred by determining Massie's filing of his discrimination complaint with the DLSE did not trigger Ralphs's contractual right to compel Massie to arbitrate that complaint in accord with an agreement he signed during his employment with Ralphs. Ralphs also contends the superior court reversibly erred by determining Massie's arbitration agreement with Ralphs did not bar State from investigating Massie's discrimination complaint or otherwise exercising its administrative jurisdiction under Labor Code section 98.7.[2] Further, citing *Howsam v. Dean Witter Reynolds, Inc.* (2002) 123 S.Ct. 588 (*Howsam*), Ralphs contends that in deciding whether to compel arbitration, a court may consider only two gateway issues of arbitrability unless the parties have clearly and unmistakably provided otherwise. (*Id.* at pp. 591-592.) "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide. [Citations.] Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court." (*Id.* at p. 592.)

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1 We may refer to Lujan, the Labor Commissioner and the DLSE individually or collectively as State.

2 Unless otherwise specified, all further statutory references are to the Labor Code.

The record indicates that without first determining the first gateway dispute whether Massie was bound by a valid and enforceable arbitration agreement, the superior court proceeded to determine the second gateway dispute adversely to Ralphs by concluding (1) Ralphs's contractual right to compel arbitration was unripe because the filing of Massie's discrimination complaint with the DLSE did not trigger Massie's obligation under his agreement with Ralphs to arbitrate his employment-related claims, and (2) the arbitration agreement between Massie and Ralphs did not preclude State from maintaining the administrative proceedings initiated by Massie's complaint. (*Howsam*, *supra*, 123 S.Ct. at p. 592.) Because the superior court did not comply with the process mandated by the Supreme Court for determining the two gateway issues of arbitrability bearing on the decision whether to compel arbitration, we reverse the order denying Ralphs's petition and direct the superior court to determine whether the parties' arbitration agreement is binding and enforceable against Massie before the court proceeds, if necessary, to determine the issues whether the Federal Arbitration Act (FAA) (9 U.S.C. § 2) requires arbitration of Massie's Labor Code discrimination complaint and whether the United States Constitution's Supremacy Clause applies to preempt State's administrative proceedings on Massie's complaint. (*Perry v. Thomas* (1987) 482 U.S. 483, 489 (*Perry*); *Southland Corp. v. Keating* (1984) 465 U.S. 1, 11-12 (*Southland*).

I

INTRODUCTION

In 1985 Massie began working for Ralphs. In 2001 Massie signed an "Employee Acknowledgement" stating he received, read and understood Ralphs's "Dispute

Resolution Program Mediation & Binding Arbitration Policy" (the Policy).[3] In May 2002 Ralphs terminated Massie's employment.

In October 2002 Massie filed a discrimination complaint with the DLSE asserting Ralphs violated the law by discharging him for "lawful conduct occurring during nonworking hours away from the employer's premises."[4] State notified Ralphs that Massie had filed a complaint that State intended to investigate.

In February 2003, after seeking unsuccessfully to persuade Massie and State that Massie's discrimination complaint was subject to mandatory arbitration and that State lacked jurisdiction over Massie's complaint, Ralphs filed its petition in the superior court to compel Massie to arbitrate, and to stay State's administrative proceedings on Massie's complaint. In opposing Ralphs's petition, Massie asserted the Arbitration Agreement was unenforceable because it was procedurally and substantively unconscionable; his filing of a discrimination complaint with the DLSE did not initiate any "formal dispute resolution"

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[3] We refer to the Employee Acknowledgement and the Policy collectively as the Arbitration Agreement.

[4] Massie's complaint referred to a violation of section 96, subdivision (k), a statute providing that upon an employee's filing of a claim with State, the Labor Commissioner shall take an assignment of a claim "for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises." (*Ibid.*) "By its plain language, . . . section 96 *itself* does not describe any public policies. Rather, it simply outlines the types of claims over which the Labor Commissioner shall exercise jurisdiction." (*Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, 535.)

At the time Massie filed his complaint, section 98.6 was the applicable statute establishing the substantive right asserted by Massie and section 98.7 was the applicable statute establishing State's DLSE administrative proceedings initiated by complaint.

that would trigger his contractual obligation to arbitrate; and Ralphs's right to compel arbitration had not yet ripened. State's opposition to Ralphs's petition asserted that the FAA did not preempt State's power to investigate Massie's discrimination complaint because State was not a party to the Arbitration Agreement, and that the Labor Commissioner, not employee complainant Massie, controlled the investigation of the complaint.

In April 2003 the superior court denied Ralphs's petition. The court concluded Massie's filing of his discrimination complaint with the DLSE initiated State's administrative proceedings, but did not trigger Massie's contractual arbitration obligation because those administrative proceedings did not presently involve Massie as a party. Hence, the court denied Ralphs's request to compel arbitration on the ground Ralphs's contractual arbitration right was unripe. Citing *E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279 (*Waffle House*), the superior court also concluded the Arbitration Agreement between Massie and Ralphs did not preclude non-signatory State from investigating employee Massie's discrimination complaint or otherwise exercising its administrative jurisdiction under section 98.7. The court thus declined to stay the Labor Commissioner's administrative proceedings.

On this appeal, Ralphs seeks reversal of the superior court order denying its petition. Because the superior court prejudicially erred by not complying with the procedural requirements mandated in *Howsam*, *supra*, 123 S.Ct. 588, when it decided the arbitrability of Massie's Arbitration Agreement with Ralphs, the order must be reversed and the matter remanded for further proceedings.

II

DISCUSSION

We review de novo the legal question whether the FAA required the court to grant Ralphs's petition to compel arbitration and stay State's administrative proceedings. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699; *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 1210-1211.)

As enacted in 1925, the FAA's "'purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.'" (*Waffle House*, *supra*, 534 U.S. at p. 289.) "The FAA broadly provides that a written provision in 'a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" (*Ibid.*, citing 9 U.S.C. § 2.) In enacting section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." (*Southland*, *supra*, 465 U.S. at p. 10; accord, *Perry*, *supra*, 482 U.S. at p. 489.) Thus, the "FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements.'" (*Waffle House*, at p. 294.) "'Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.'" (*Perry*, at p. 489.) Employment contracts are generally covered by the FAA. (*Waffle House*, at p. 289.)

"California law, like federal law, favors enforcement of valid arbitration agreements." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97 (*Armendariz*).) The California Supreme Court has acknowledged that the FAA "generally preempts state legislation that would restrict the enforcement of arbitration agreements." (*Armendariz*, at p. 98, citing *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687-688 (*Doctor's Associates*).) The California Supreme Court also has acknowledged that the FAA "incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights." (*Armendariz*, at pp. 96-97.) Moreover, the California Supreme Court has stated: "Assuming an adequate arbitral forum, we agree with the [United States] Supreme Court that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" (*Id.* at pp. 98-99, citing *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628)

A

Superior Court Must Determine If The Arbitration Agreement Is Valid and Enforceable

As discussed, in deciding whether to compel arbitration, the superior court should have first determined the gateway issue whether the Arbitration Agreement is enforceable against Massie as valid and binding. (*Howsam*, *supra*, 123 S.Ct. at pp. 591-592.) "Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which . . . provides that arbitration agreements are 'valid,

enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.' The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (9 U.S.C. § 2), recognized that 'generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements . . . .'" (*Armendariz, supra*, 24 Cal.4th at p. 114, citing *Doctor's Associates*, *supra*, 517 U.S. at p. 687.)

"'[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on "'oppression"' or "'surprise"' due to unequal bargaining power, the latter on "'overly harsh"' or "'one-sided"' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212-1213.)

"'Procedural unconscionability' concerns the manner in which the contract was negotiated and the circumstances of the parties at that time.'" (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329 (*Kinney*); *American*

Software, Inc. v. Ali (1996) 46 Cal.App.4th 1386, 1390.) "Substantive unconscionability focuses on the actual terms of the agreement . . . ." (*American Software, Inc.* at p. 1390.) "Unconscionability is ultimately a question of law for the court." (*Id.* at p. 1391.)

In opposing Ralphs's request to compel arbitration, Massie presented evidence bearing on his defense that the Arbitration Agreement was unconscionable. In particular, Massie submitted his declaration that asserted: When Massie was asked to sign the Employee Acknowledgement, he "may not have been given" the Policy "contemporaneously"; Massie was explicitly told by his superior that he had to sign the Employee Acknowledgement, and that "everyone else had signed it"; when Massie expressed his "reservation" about signing the Employee Acknowledgement, he was told, "'You just need to sign it Assshole! [*sic*]'"; Massie felt "pressured" to sign the Employee Acknowledgement, with the "implication" that if he did not sign, he might lose his job, "be demoted, or never be considered for further advancement"; Massie was "not given sufficient time to seek counsel or outside advice, or thoroughly review" the Policy "in its entirety"; and Massie was "not advised to seek the advice of, or consult with, an attorney regarding" the Policy. In replying to Massie's opposition to its request to compel arbitration, Ralphs presented no contrary evidence.

Despite the evidence presented by Massie, the superior court did not reach the issue whether the Arbitration Agreement was procedurally unconscionable. (*Armendariz*, *supra*, 24 Cal.4th at pp. 114-115; *Kinney*, *supra*, 70 Cal.App.4th at pp. 1329-1330; *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1586-1588.) Similarly, although Massie

argued the Arbitration Agreement was also substantively unconscionable, the court did not reach that issue.

By not reaching the issue of unconscionability, the superior court failed to determine the first gateway dispute of arbitrability, to wit, whether the Arbitration Agreement was enforceable against Massie. (*Howsam*, *supra*, 123 S.Ct. at pp. 591-592.) Because the court prejudicially erred by not following *Howsam's* mandated procedures in deciding whether to compel arbitration, the order denying Ralphs's petition must be reversed and the matter remanded to the superior court for determination of that first gateway dispute.

B

May Court Compel Arbitration of Employee's Statutory Discrimination Complaint?

If the superior court finds upon remand that the Arbitration Agreement is not enforceable against Massie, the court need not reach the second gateway issue of arbitrability, to wit, whether the Arbitration Agreement applies to Massie's statutory discrimination claim filed with the DLSE. However, in the event it finds the Arbitration Agreement is enforceable against Massie, the superior court must determine that second gateway issue of arbitrability. For the superior court's guidance in doing so, we set forth our views on the extent to which a contractual arbitration provision may apply to an employee's statutory claim before the Labor Commissioner.

By filing with the DLSE a discrimination complaint alleging an employer has violated section 98.6,[5] an employee initiates State's administrative proceedings consisting of the Labor Commissioner's investigation and a potential hearing on the alleged violation (§ 98.7, subds. (a) & (b)); the Labor Commissioner's determination whether a violation occurred and potential remedial order (*id*., subd. (c));[6] a potential lawsuit by the Labor Commissioner to enforce the order (*ibid.*); or a potential lawsuit by the employee complainant when the Labor Commissioner has determined no violation occurred (*id.*, subd. (d)(1)). The court in either of those potential lawsuits would have jurisdiction to restrain a violation by the employer and order all appropriate relief. (*Id.*, subds. (d)(1),

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5 Section 98.6, subdivision (a) provides in relevant part: "No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 . . . ."

Section 98.6, subdivision (b) provides: "Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 . . . *shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer*. Any employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration or hearing authorized by law, is guilty of a misdemeanor." (Italics added.)

6 Subdivision 98.7, subdivision (c) provides in relevant part: "If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees associated with any hearing held by the Labor Commissioner in investigating the complaint, and the posting of notices to employees."

(e).) In each case, "[a]ppropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon," and "other compensation or equitable relief as is appropriate under the circumstances of the case." (*Ibid.*)

State's administrative proceedings under sections 98.6 and 98.7 implement its statutory authority to protect employees from violations of their civil rights and civil liberties, both constitutional and statutory, by their employers. (*Armendariz*, *supra*, 24 Cal.4th at p. 99, fn. 6; cf. *Waffle House*, *supra*, 534 U.S. at pp. 287-289, 293-294.) Sections 98.6 and 98.7 provide "critically important protections against discrimination." (Cf. *Armendariz*, at p. 98.) The "imperative to enforce such protections does not, as a general matter, inherently conflict with arbitration." (*Ibid.*) However, under some circumstances, statutory administrative proceedings may be preempted by the FAA as purporting to displace an arbitration forum required by agreement between employee and employer for resolution of employment-related disputes. (*Howsam*, *supra*, 123 S.Ct. at pp. 591-592; *Waffle House*, at pp. 293-294.)

In particular, when an employee with a valid arbitration contract covering statutory employment-related claims seeks the legislatively mandated victim-specific remedies of "reinstatement and reimbursement for lost wages and work benefits" (§ 98.6, subd. (b)) for an employer's alleged statutory violation in administrative proceedings authorized by section 98.7 under circumstances where the employee could obtain the same relief in arbitration, the FAA preempts those administrative proceedings. In that situation, the Labor Commissioner's administrative actions with respect to the employee's

complaint would not further the broader public interest because the primary effect of the administrative proceedings would be vindication of the employee's rights and economic interests through victim-specific remedies. In cases where State goes to court against an employer to enforce its determination of a statutory violation on an employee's complaint seeking victim-specific relief, State's lawsuit is "merely derivative" of the employee's causes of action against the employer. Under those circumstances, State — though not a signatory to the employee's arbitration agreement with the employer — is deemed to stand in the employee's "shoes" so as to be bound by the employee's contractual arbitration obligation. (*Waffle House*, *supra*, 534 U.S. at p. 297.) Because State's administrative proceedings under those circumstances interfere or conflict irreconcilably with employers' contractual arbitration rights, the FAA preempts State's enforcement of employees' discrimination complaints and requires their arbitration. (*Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 299-300.)[7]

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[7] Nothing in our discussion of the nature of the Labor Commissioner's administrative proceedings under the statutory scheme at issue here should be construed as applying to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Unlike the Labor Commissioner's administrative proceedings involving an investigation, a determination whether an employer has violated labor law, a potential remedial order and potentially ensuing judicial litigation, the administrative procedures under FEHA simply consist of an investigation, a probable cause finding, conciliation and potential accusatory proceedings seeking fines or other remedies not available to the Labor Commissioner. Further, as the California Supreme Court cautioned in *Armendariz*, *supra*, 24 Cal.4th 83, a case involving FEHA, a determination that a claim is arbitrable between the contracting parties should not "be interpreted as implying that an arbitration agreement can restrict an employee's resort to the Department of Fair Employment and Housing, the administrative agency charged with prosecuting complaints made under the FEHA, or that the department would be prevented from carrying out its statutory functions by an arbitration agreement to which it is not a party." (*Id.*, at p. 99, fn. 6.)

Finally, as discussed, the remedies available to the Labor Commissioner under State's statutory scheme go beyond those generally available in arbitration. Further, section 98.7, subdivision (f) provides: "The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law." Evidence indicates the Labor Commissioner often proceeds against an employer for relief of minimal interest to the employee complainant, including remedies that are not victim-specific, such as posting of notices advising employees of their legal rights and injunctive relief to compel the employer's future compliance with the law. The Legislative intent and public policy underlying State's administrative proceedings indicate those statutorily-authorized remedies are necessary to protect employees' constitutional and statutory rights. (§ 98.6; Stats. 2001, ch. 825, § 1; Stats 1999, ch. 692, § 1; cf. *Armendariz*, *supra*, 24 Cal.4th at p. 101.) We find nothing in FAA jurisprudence that would necessarily preclude an employee from pursuing in State's administrative proceedings remedies that are not victim-specific, or preclude State from exercising its statutory authority to protect employees' civil rights through such remedies.

Similarly, nothing in our discussion should be interpreted as applying to the administrative procedures of the federal Equal Employment Opportunity Commission (EEOC), an agency that "cannot pursue a claim in court without first engaging in a conciliation process." (*Waffle House*, *supra*, 534 U.S. at p. 290, fn. 7.) Indeed, in *Waffle House* the United States Supreme Court held that an arbitration agreement between employer and employee did not bar the non-signatory EEOC from exercising its independent enforcement authority to obtain victim-specific relief.

C

Conclusion

On this record, the superior court prejudicially erred in denying Ralphs's petition.

III

DISPOSITION

The order is reversed with directions to the superior court to adjudicate Ralphs's petition in harmony with this opinion. Ralphs shall have costs on appeal.

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IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.